

**Matter of Gateway III, LLC v Action EI., Inc.**

2007 NY Slip Op 32547(U)

August 7, 2007

Supreme Court, New York County

Docket Number: 0106779/2007

Judge: Joan Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Madden  
*Justice*

PART 11

Gateway III, LLC

INDEX NO. 106779-07

MOTION DATE 6-29-07

- v -

Action Elevator, Inc.

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion petition is decided in accordance with the annexed Memorandum Decision, order + Judgment.

RECEIVED  
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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: August 8, 2007

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

DO NOT POST

REFERENCE

CASE 107

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
In the Matter of the Application of GATEWAY III, LL

Index No. 106779/07

Petitioner,

For an Order Pursuant to Lien Law 19(6) Discharging the  
Mechanic's Lien of ACTION ELEVATOR, INC.,  
Respondent.

-----X  
JOAN A. MADDEN, J.:

Petitioner Gateway III, LLC moves, pursuant to Lien Law § 19(6), to discharge a Notice of Mechanics Lien filed by respondent Action Elevator, Inc., arguing that the notice failed to comply with the provisions of Lien Law § 9 and Real Property Law § 339-1. Respondent opposes the petition, which is granted for the reasons below.

Background

In March 2004, respondent entered into an agreement with petitioner for the installation of a passenger elevator at 263 West 112<sup>th</sup> Street, New York, New York, known as Block 1828, Lot 5 ("the premises"). At the time of the agreement, petitioner was the owner and developer of the premises. At issue in this proceeding is a notice of mechanics lien filed by respondent against the premises in the amount of \$39,528.53, for unpaid labor and materials furnished in connection with its installation of the elevator.

On July 18, 2006, a Declaration of Condominium Plan dated June 1, 2006 for the condominium ownership of the premises was duly recorded and filed. In accordance with the plan and effective July 18, 2006, the premises was divided into five units, now known as Lots 1301 through 1305 on the tax map of New York County. The Declaration of Condominium Plan

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

designated the premises "The Leonora Condominium."

On August 4, 2006, petitioner sold, granted and released to purchasers, Mutaza Haque and Henna Haque, Unit 2 of The Leonora Condominium, also known as Block 1828, Lot 1302, together with an 18.26% interest in the common elements appurtenant to the unit, pursuant to a unit deed dated August 4, 2006, which was recorded on September 25, 2006.

On August 8, 2006, petitioner sold, granted and released to purchasers, George R. Hatzman and Jennifer Hatzman, Unit 3 of the The Leonora Condominium, also known as Block 1828, Lot 1303, together with an 18.26% interest in the common elements appurtenant to the unit, pursuant to a unit deed dated August 8, 2006. The deed was recorded on September 14, 2006.<sup>1</sup>

On September 27, 2006, respondent filed a notice of lien in the amount of \$39,528.53, for unpaid labor and materials furnished in connection with its installation of the elevator. The notice of lien identified petitioner as the owner of the premises and indicated that the property that was the subject of the lien was located at 263 West 112, New York, NY, Block 1828, Lot 5.

Petitioner seeks to discharge the notice of lien, arguing that it constitutes an invalid "blanket lien" which attempts to encumber the common elements of The Leonora Condominium in contravention of § 339-1 of the New York Real Property law. Petitioner further argues that under Lien Law § 9, the notice of lien is invalid as it identifies only petitioner as owner of the premises, even though two units are now owned by third parties, and fails to specify the correct block and lot description since each unit has been given an individual lot designation (Lots 1301

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<sup>1</sup>While certain of the submissions indicate that three units were sold, the verified petition alleges, and the record indicates, that two units were sold.

[ 4 ]  
through 1305).

Respondent opposes the petition, arguing that issues of fact exist as to whether petitioner retained ownership of the common elements and certain of the lots at the time that the lien was filed, and that some work was performed by it on June 13, 2006, after the June 1, 2006 date of the Declaration of Condominium Plan. Respondent also asserts that the notice of lien substantially complied with the requirements of Lien Law § 9(2) and (7) and therefore should not be discharged.

### Discussion

Section 339-1 of the Real Property Law, provides, in relevant part, that:

1. Subsequent to the recording the declaration and while the property remains subject to this article, no lien of any nature shall thereafter arise or be created against the common elements except with unanimous consent of the unit holders. During such period, liens may arise or be created only against the several units and their respective interests.

2. Labor performed on or materials furnished to a unit shall not be the basis for the filing of a lien pursuant to article two of the lien law against any unit owner not expressly consenting to or requesting th same, except in the case of emergency repairs. No labor performed on or materials furnished to the common elements shall be the basis for a lien thereon, but only common charges received and to be received by the board of managers, and the right to receive such funds, shall constitute trust funds for the purpose of paying the cost of such labor and materials performed or furnished at the express request or with the consent of the manager, managing agent or board of managers, and the same will be expended first for such purpose before expending any part of the same for any other purpose.

This section “prohibits creation of a lien against the common elements of the condominium subsequent to the recording of the condominium declaration without the

[\*5]  
unanimous consent of the unit owners.” Diamond Architecturals, Inc. v. EFCO Corp., 179 AD2d 420, 421 (1<sup>st</sup> Dept), appeal dismissed, 80 NY2d 919 (1992). That being said, when, as here, the owner of the property retains an interest in certain units “the lien is valid to the extent of such interest.” Advanced Alarm Technology, Inc. v. Pavillion Associates, 145 AD2d 582, 584 (2d Dept 1988).

However, if the notice of lien fails to describe the owner’s interest in such units as required under Lien Law § 9(7)<sup>2</sup>, but rather imposes “a blanket lien” on the entire property in contravention of Real Property Law §339-1, the lien is also invalid against the owner’s interest. Id.; see also, Diamond Architecturals, Inc. v. EFCO Corp., 179 AD2d at 421 (holding that while the owner and developer of the condominium retained an interest in the unsold units when notice of lien was filed, the lien was nonetheless invalid as against this interest since the description of the property described the entire building rather than particular units of the condominium, and omitted the names of the individual unit owners); Advanced Alarm Technology, Inc. v. Pavillion Associates, 145 AD2d 582, 584 (same); compare, Mussen v. Franklin Square Assocs.V., LLC, 22 AD3d 1022 (3d Dept 2005)(holding that while invalid against the condominium building, the lien remains valid against two remaining parcels of land held by owner at time lien was filed).

Here, respondent filed its notice of lien after the Declaration of Condominium Plan was recorded and the premises was divided into five units, with individual lot numbers, and two of

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<sup>2</sup>Lien Law § 9(7) provides, in relevant part, that:

The property subject to the lien, with a description thereof sufficient for identification...A failure to state the name of the true owner or contractor, or a misdescription of the true owner shall not affect the validity of the lien....

[\* 6]

the units were sold to third parties. Thus, the notice of lien is defective as it imposes a lien on the common areas of the condominium, and there is no dispute that the consent of the unit holders was not obtained prior to filing of the notice. The notice of lien is also invalid as to petitioner's remaining interest in the three units since it describes the entire property instead of the individual units in which it was divided, and refers only to petitioner and omits the names of owners of two of the units. Accordingly, the petitioner is entitled to an order discharging the lien. Northeast Restoration Corp. v. K&J Construction Co. LP, 304 AD2d 306 (1<sup>st</sup> Dept 2003); Atlas Tile and Marble Works, Inc. v. S&H 88<sup>th</sup> Street Associates, 191 AD2d 247 (1<sup>st</sup> Dept 1993); Diamond Architecturals, Inc. v. EFCO Corp., 179 AD2d at 421; Advanced Alarm Technology, Inc. v. Pavillion Associates, 145 AD2d at 584.

Furthermore, the cases relied on by respondent are not controlling here. In A.C. Green Electrical Contractors, Inc. v. Fu, 240 AD2d 243 (1<sup>st</sup> Dept 1997), the court found that summary judgment was not properly granted discharging a lien when (1) it was alleged that the work was performed both before and after the filing of the declaration of condominium and before and after the individual owners purchased their units; (2) the record raised an issue of fact as to whether "the individual unit owners were so allied with [the defendant owner/developer] such that [the defendant owner/developer] could still be considered the fee owner, and (3) the defendant owner/developer remained the owner of all of the common elements of the building. In contrast, in this case, the work for which respondent seeks to recover was performed before the filing on the Declaration of Condominium Plan,<sup>3</sup> and before the individual owners purchased their units.

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<sup>3</sup>While certain work was allegedly performed after the date of the declaration of condominium, the filing date is the relevant date.

In addition, there is no evidence that the individual purchasers had any relationship to petitioner, and the record shows that the individual purchasers, and not just petitioner, own the common areas of the condominium.

Respondent's reliance on United Brotherhood of Carpenters and Joiners of America, by Lucassen, v. Nyack Waterfront Associates, 182 AD2d 16 (3d Dept 1992), is also misplaced. That case involved a three phased condominium project, in which only the first phase was established as a condominium through the filing of a declaration of condominium. The lien at issue covered the entire property and listed the owner developer as the owner of the property. While the court held that the lien was invalid as to the first phase, it held that it was valid with respect the undeveloped or partial developed land retained by the developer for phases two and three of the project. In the instant case, as the Declaration of Condominium Plan applied to all of the property at issue, and petitioner has not retained any undeveloped property in addition to the condominium property, the holding in United Brotherhood of Carpenters and Joiners of America, by Lucassen does not support respondent's position.

Finally, Niagra Venture v. Sicoli & Massaro, Inc., 77 NY2d 175 (1990), which is also cited by respondent, is inapplicable here as the property against which the lien was filed was not a condominium and thus Real Property Law §339-1 was not implicated.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted; and it is further

ORDERED and ADJUDGED that the notice of lien in the sum of Thirty Nine Thousand Five Hundred and Twenty Eight Dollars and Fifty Three Cents (\$39,528.53) filed by respondent Action Elevator, Inc. on or about September 27, 2007 in the Office of the Clerk of New York

County against certain property described as 263 West 112<sup>th</sup> Street, New York, NY, Block 1828, Lot 5, to secure a claim for labor and material in connection with the improvement of said real property, be and the same is discharged for failure to comply with Lien Law § 9 and Real Property Law § 339-1.

DATED: August 7, 2007

  
\_\_\_\_\_  
J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).